No. 84-320

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In the Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL FARMERS UNION INSURANCE COMPANIES, *et al.*

v.

CROW TRIBE OF INDIANS, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

[redacted]

BRIEF *AMICI CURIAE* OF THE ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK RESERVATION, CHEYENNE RIVER SIOUX TRIBE, DEVILS LAKE SIOUX TRIBE, MESCALERO APACHE TRIBE, NEZ PERCE TRIBE, PUEBLO OF LAGUNA, SENECA NATION OF INDIANS, STANDING ROCK SIOUX TRIBE, AMERICAN INDIAN LAWYER TRAINING PROGRAM, INC., ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC., NATIONAL AMERICAN INDIAN COURT JUDGES ASSOCIATION, NATIONAL INDIAN JUSTICE CENTER AND NORTHWEST INTERTRIBAL COURT ASSOCIATION

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* OF THE ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK RESERVATION, CHEYENNE RIVER SIOUX TRIBE, DEVILS LAKE SIOUX TRIBE, MESCALERO APACHE TRIBE, NEZ PERCE TRIBE, PUEBLO OF LAGUNA, SENECA NATION OF INDIANS, STANDING ROCK SIOUX TRIBE, AMERICAN INDIAN LAWYER TRAINING PROGRAM, INC., ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC., NATIONAL AMERICAN INDIAN COURT JUDGES ASSOCIATION, NATIONAL INDIAN JUSTICE CENTER AND NORTHWEST INTERTRIBAL COURT ASSOCIATION

Pursuant to Rule 36.3, the above-named Indian tribal governments and Indian-interest organizations move for leave to file this brief *amici curiae* in the above-captioned case. Respondents Leroy Sage and Flora Not Afraid have consented in writing to the filing of this brief. Petitioners have been asked for consent, but as of this writing have not given written consent. Respondents Crow Tribe

and Crow Tribal officials are without counsel at this time and, therefore, have not given their consent.

INTEREST OF *AMICI CURIAE*

Amici Assiniboine and Sioux Tribes of the Fort Peck Reservation, Cheyenne River Sioux Tribe, Devils Lake Sioux Tribe, Mescalero Apache Tribe, Nez Perce Tribe, Pueblo of Laguna, Seneca Nation of Indians and Standing Rock Sioux Tribe all are federally-recognized Indian tribes. Each has a well-organized legal system and each asserts civil jurisdiction over non-Indians in some cases. The outcome of this case may directly affect the permissible scope of the civil jurisdiction of *amici's* courts and the extent to which federal courts intrude into the functioning of those courts.

The National American Indian Court Judges Association is an organization of 250 tribal judges representing 149 tribal courts across the country. The Northwest Intertribal Court Association is the tribal court system for thirteen tribes in the State of Washington. The American Indian Lawyer Training Program, Inc., and the National Indian Justice Center are non-profit corporations. These organizations are devoted to the improvement and strengthening of tribal justice systems and the protection of tribal jurisdiction.

The Association on American Indian Affairs, Inc., is a nonprofit membership corporation organized under the laws of the State of New York for the purpose of protecting the rights and improving the welfare of American Indians. The Association frequently has participated in leading cases involving issues of Indian law before the federal and state courts, including the filing of briefs *amicus curiae* with this Court.

The issues in this case present broad questions regarding the scope of tribal civil authority over non-Indians and the power of federal courts to impede tribal action.

In order to facilitate this Court's consideration of the legal and policy implications of this case, *amici* will show that: (1) Indian tribal courts generally have jurisdiction to adjudicate the liability of non-Indians for acts affecting Indians and occurring on a reservation; and (2) if federal courts in fact have jurisdiction over actions challenging tribal civil adjudicatory authority, such jurisdiction should be exercised only if the persons challenging tribal authority have exhausted their remedies under tribal law.

Amici are concerned that these issues will not be addressed adequately by the parties for two reasons. First, the parties seek a specific result in this case while *amici* are more concerned with the broader implications of the Court's decision and its effect upon them. Second, respondent Crow Tribe currently is without counsel and the interests of tribal governments may not be presented to the Court. Wherefore, *amici* request that their motion for leave to file the attached brief *amici curiae* be granted.

Respectfully submitted,

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Pursuant to Rule 36.3, the above-named Indian tribal governments and Indian-interest organizations file this brief *amici curiae* in support of the respondents in the above-captioned case.

INTEREST OF *AMICI CURIAE*

Amici Assiniboine and Sioux Tribes of the Fort Peck Reservation, Cheyenne River Sioux Tribe, Devils Lake Sioux Tribe, Mescalero Apache Tribe, Nez Perce Tribe, Pueblo of Laguna, Seneca Nation of Indians, and Standing Rock Sioux Tribe are all federally recognized Indian tribes, with tribal governments recognized by the Secretary of the Interior. Each has a well-organized legal system, including tribal courts.[1] Each asserts civil jurisdiction over non-Indians in some cases.[2] The outcome of this case may directly affect the permissible scope of the civil jurisdiction of *amici*'s courts. It may also affect the extent to which federal courts intrude into the functioning of those courts. Thus, *amici* have a direct interest in the outcome of this case.

The National American Indian Court Judges Association is an organization of 250 tribal judges representing 149 tribal courts across the country. The Northwest Intertribal Court Association is the tribal court system for thirteen tribes in the State of Washington. These organizations are devoted to the improvement and strengthening of tribal courts, judges and procedures, and the protection of tribal court jurisdiction. Between them, they represent the vast majority of all operating Indian tribal court systems.

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[1] Two of the Tribes have recently adopted comprehensive revisions of their Codes of Justice, the Standing Rock Tribe in 1981 and the Assiniboine and Sioux Tribes in 1985. A third, the Cheyenne River Sioux Tribe, currently is engaged in a revision of its code as well.

[2] *E.g.*, Comprehensive Code of Justice of the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Title I, Sec. 107; Standing Rock Sioux Tribe Code of Justice, Title I, Sec. 1-107; Devils Lake Sioux Tribe Law and Order Code, Chapter I, Sec. 102(3).

The American Indian Lawyer Training Program, Inc., and the National Indian Justice Center are non-profit corporations. These organizations are devoted to the improvement and strengthening of tribal justice systems. To this end, they offer a variety of training programs for tribal court judges, advocates and lay personnel.

The Association on American Indian Affairs, Inc., is a nonprofit membership corporation organized under the laws of the State of New York for the purpose of protecting the rights and improving the welfare of American Indians. The Association is the largest Indian-interest organization in the United States, and is nation-wide in scope, with a membership of 50,000 that consists of both Indians and non-Indians. The Association frequently has participated in leading cases involving issues of Indian law before the federal and state courts, including the filing of briefs *amicus curiae* with this Court.

The issues in this case present broad questions regarding the scope of tribal civil authority over non-Indians and the power of federal courts to impede tribal action. In order to facilitate this Court's consideration of the legal and policy implications of this case, *amici* will address only some of the several issues implicit in the questions as to which *certiorari* was granted. Specifically, *amici* will show that: (1) Indian tribal courts generally have jurisdiction to adjudicate the liability of non-Indians for conduct affecting Indians and occurring on a reservation; (2) tribal jurisdiction over the School District is not barred by sovereign immunity; (3) if federal courts in fact have jurisdiction over actions challenging tribal civil adjudicatory authority, such jurisdiction should be exercised only if the persons challenging tribal authority have exhausted their remedies under tribal law; and (4) Indian tribal courts are modern tribunals employing rules of law and procedure familiar to all.

SUMMARY OF ARGUMENT

The decisions of this Court have established beyond peradventure that Indian tribes have the power of civil adjudication in disputes involving Indians and non-Indians arising in Indian Country. This Court also has recognized tribal regulatory power over non-Indians—a power which must involve the adjudicatory power to enforce those regulations. Tribal civil jurisdiction is not divested by constraints implicit in the tribes' status as domestic dependent sovereigns. The Executive Branch and the Congress have joined the federal courts in acting consistently on the assumption that the tribes retain such jurisdiction.

In the case of negligent acts causing personal injury to tribal members, the health and welfare of the tribe clearly are at stake, and the tribe, therefore, has jurisdiction to adjudicate civil liability flowing from that conduct. In this regard, the tribe represents its members collectively. If non-Indian conduct affecting one tribal member is one instance of a larger class of conduct that threatens the health and welfare of tribal members, the tribe has jurisdiction to regulate, and to adjudicate liability arising from, that conduct.

Sovereign immunity does not bar the action in Crow Tribal Court. Just as a tribe is subject to state jurisdiction for its off-reservation activities, so too is a state subject to tribal jurisdiction for its on-reservation activities. Moreover, Montana has waived its immunity from suit for local governmental entities.

Assuming that federal court jurisdiction exists to hear challenges to tribal civil adjudicatory jurisdiction, that authority should be exercised only where necessary. Considerations of comity, judicial restraint and judicial economy support a requirement that non-Indians challenging tribal jurisdiction first litigate the question in tribal forums. This case exemplifies the unhappy consequences that result when exhaustion is not required.

These Indian forums, at the urging and with the assistance of the United States, have evolved as modern, competent judicial tribunals. They have shown their facility for analyzing jurisdictional issues of the type presented here. Their rules of law and procedure are fair, reasonable and familiar. Respect for tribal court processes and prerogatives supports a requirement of federal abstention until tribal courts have expressed their views on such jurisdictional issues.

ARGUMENT

I. The Crow Tribal Court may assert jurisdiction over civil actions arising on the Reservation brought by tribal members against non-members absent any express limitation in federal statutory law or tribal law.

A. The decisions of this Court and other courts have recognized consistently the power of Indian governments to adjudicate personal and property rights of non-Indians.

That Indian tribal courts have jurisdiction to adjudicate civil claims arising on the reservation and involving both Indian and non-Indian parties must be regarded as beyond doubt. This conclusion follows inevitably from previous decisions of this Court and other courts recognizing the power of tribal courts to adjudicate such controversies.

In *Willams* v. *Lee*, 358 U.S. 217 (1959), this Court held that tribal jurisdiction over a contract dispute between a non-Indian plaintiff and an Indian defendant was exclusive of state jurisdiction. The non-Indian plaintiff's right of action, therefore, was governed by tribal law and cognizable only in tribal court. The same result was reached in *Kennerly* v. *District Court*, 400 U.S. 423 (1971), despite the existence of a tribal resolution pur-

porting to grant concurrent jurisdiction over civil suits involving tribal members to the State of Montana.[3]

The results in *Williams* and *Kennerly* were grounded, of course, in the long-standing rule that, on their reservations, Indians and their conduct are to be judged by the rules and standards they have established for themselves. *Williams, supra*, 358 U.S. at 223; *Ex Parte Crow Dog*, 109 U.S. 556, 571 (1883). This rule does not define limitations on tribal power but, rather, defines the subject matters as to which tribal authority is exclusive and the states have no power to act absent a grant of authority from Congress. The scope of tribal power consistently has been recognized to extend far beyond merely regulating the conduct of its members. Indeed, Indian tribes may regulate non-Indian conduct, thereby affecting important personal and property rights of non-Indians, in a variety of ways.

In *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1982), for example, the Court held that a tribe may tax non-Indians who conduct business on the reservation, and that the power to tax "is an inherent power necessary to tribal self-government and territorial management." In *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152-153 (1980), the Court noted that the power to tax non-Indians "is a fundamental attribute of sovereignty. . . ." In *Montana* v. *United States*, 450 U.S. 544, 565 (1981), the Court stated that "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. *See also Williams* v. *Lee, supra*; *Kennerly* v. *District Court*,

[3] That jurisdiction, while exclusive when the defendant is a tribal member, is shared with the state when an Indian plaintiff sues a non-Indian. *Cf.*, Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, —— U.S. ——, 104 S.Ct. 2267 (1984).

supra; *United States* v. *Mazurie*, 419 U.S. 544, 557-558 (1975).[4]

In recognizing the power of Indian tribes to regulate by civil law non-Indian conduct on the reservation, the courts implicitly have recognized tribal power to adjudicate disputes arising from the application of these regulations. Tribal power to tax, zone and otherwise regulate would be empty indeed if the tribes lack the power to adjudicate the civil liability of persons subject to such regulations for failure to abide by them. The tribes, therefore, clearly may adjudicate the civil liability of non-members for violations of tribal regulations. *See Babbit Ford, Inc.* v. *Navajo Indian Tribe*, 710 F.2d 587 (9th Cir. 1983) (Tribal law providing for liquidated damages against violators of tribal repossession law held valid as applied to non-Indians).[5]

Neither law nor history admit of any exemption for non-Indians from tribal civil judicial power. The petitioners cannot deny that tribal courts have jurisdiction over civil claims arising on the reservation by non-Indians against Indians. *Williams* and *Kennerly* foreclose such an argument. The rule should be no different when the non-Indian is the defendant. The anomaly of requiring

[4] The lower federal courts show a similar understanding of tribal civil authority over non-Indians. *E.g.*, Babbitt Ford, Inc. v. Navajo Indian Tribe, 710 F.2d 587 (9th Cir. 1983) (ordinance governing self-help repossessions); Cardin v. De La Cruz, 671 F.2d 363 (9th Cir. 1982) (building, health and safety regulations); Knight v. Shoshone & Arapaho Tribes, 670 F.2d 900 (10th Cir. 1982) (zoning ordinance).

[5] This rule also was recognized by the Solicitor of the Department of the Interior in *Powers of Indian Tribes*, 55 I.D. 14 (1934). In that opinion, the Solicitor noted the well-established power of tribes to tax and otherwise regulate non-Indians, and observed that the laws of a tribe in subject areas within its jurisdiction, "may be lawfully administered in the tribunals of the tribe . . . ." 55 I.D. at ——, *reprinted in* I Op. Int. Sol. 445, 471. *See also* F. Cohen, *Handbook of Federal Indian Law* 145 (1942) ("[T]he judicial powers of the tribe are coextensive with its legislative or executive powers.")

non-Indian suitors to bring their claims in tribal court yet exempting them from tribal process when they are defendants strains reason. So too does the notion that an Indian must abide by tribal court adjudications of liability against him, yet may not call upon that court to give redress for injuries done him by a non-Indian.[6] No sound reason exists why a tribal court should be entrusted with the non-Indian plaintiff's valuable chose in action, yet may not be trusted to adjudicate the monetary liability of the non-Indian defendant in cases such as this one. Thus, as this Court has stated, without distinction between plaintiff and defendant:

> Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.

Santa Clara Pueblo v. *Martinez*, 436 U.S. 49, 65 (1978).

B. The limitation on tribal power recognized in *Oliphant* v. *Suquamish Indian Tribe*, analyzed in light of the interests protected by it and its historical evolution, does not apply to tribal civil adjudicatory jurisdiction.

Tribal power over non-Indians, of course, is not without limitation. In *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978), for example, this Court held that

[6] The district court, apparently recognizing the untenability of such a distinction, dismisses the *Williams* rule as "old law" and seems to say that the decision in Montana v. United States, 450 U.S. 544 (1981) overrules *Williams*. *See* 560 F. Supp. at 217. This, quite clearly, is not so. The *Montana* Court itself cites *Williams* as support, 450 U.S. at 566, and this Court has cited *Williams* favorably on several occasions since the *Montana* decision. *E.g.*, New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 103 S.Ct. 2378, 2385 (1983); Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, —— U.S. ——, 104 S.Ct. 2267, 2271 (1984). While the latter case indicates that the state courts will have concurrent jurisdiction in some instances, the decision implicitely assumes that tribal court jurisdiction over civil suits against non-Indians is proper. *Id.* at 2275. The petitioners, interestingly, fail even to mention *Williams* in their brief.

Indian tribes lack the power to try and punish non-Indians for offenses against tribal law. The rule in *Oliphant*, however, does not operate to bar tribal civil adjudicatory jurisdiction. "The development of principles governing civil jurisdiction in Indian Country has been markedly different from the development of rules dealing with criminal jurisdiction." F. Cohen, *Handbook of Federal Indian Law* 253 (1982 ed.)

As this Court observed in *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152-153 (1980), "Executive Branch officials have consistently recognized that Indian tribes possess a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest . . . ." Indeed, the most comprehensive legal opinion extant regarding tribal powers holds flatly that:

> [O]ver all of the lands of the reservation, whether owned by the tribe, by members thereof, or by outsiders, the tribe has the sovereign power of determining the conditions upon which persons shall be permitted to enter its domain, to reside therein, and to do business.

Powers of Indian Tribes, 55 Interior Dec. 14, 50, I Op. Int. Sol. 445, 467 (1934). In those subject areas as to which the tribes may regulate non-Indians, they also have the power of adjudication. Tribal laws "may be lawfully administered in the tribunals of the tribe." *Id.*, I Op. Int. Sol. at 471.

The various administrative sources cited by the Court in *Oliphant* to show that the Executive Branch assumed the absence of tribal criminal jurisdiction draw a plain distinction and contrary assumption with regard to tribal civil jurisdiction. Thus, in *Jurisdiction of the Courts of the Choctaw Nation*, 7 Op. Att'y Gen. 174 (1855), the Attorney General was asked whether the tribal courts had jurisdiction over a dispute arising between Indians

and a non-Indian living within the Choctaw Nation. The Attorney General, as did this Court in *Oliphant*, noted that the Choctaw treaty with the United States contained provisions "of very significant character having exclusive reference to the question of *criminal* jurisdiction." *Id.* at 178 (emphasis in original), *and see Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 197-199 (1978). Congress had enacted a comprehensive scheme of criminal jurisdiction over offenses by or against non-Indians in which tribal forums had no role to play. 7 Op. Att'y Gen. at 179; *Oliphant*, *supra*, at 200-201.

Civil jurisdiction, however, was another matter entirely.

> But there is no provision of treaty, and no statute, which takes away from the Choctaws jurisdiction of a case like this, a question of property strictly internal to the Choctaw nation; nor is there any written law which confers jurisdiction of such a case in any court of the United States. . . .
> . . .
>
> The conclusion seems to me irresistible, not that such questions are justiciable nowhere, but that they remain subject to the local jurisdiction of the Choctaws.
> . . .
>
> Now, it is admitted on all hands . . . that Congress has 'paramount right' to legislate in regard to this question, in all its relations. *It has legislated, in so far as it saw fit, by taking jurisdiction in criminal matters, and omitting to take jurisdiction in civil matters. . . . By all possible rules of construction the inference is clear that jurisdiction is left to the Choctaws themselves of civil controversies arising strictly within the Choctaw Nation.*[7]

7 Op. Att'y Gen. at 179-181 (emphasis added).

[7] The non-Indian subjected to tribal civil jurisdiction under the Attorney General's opinion was an adopted citizen of the Chickasaw Nation. Note, however, that his status as a Chickasaw citizen could not subject him to tribal criminal jurisdiction, because he remained a citizen of the United States. By the same token, the fact that he was a United States citizen did not immunize him from tribal civil jurisdiction.

The Executive Branch's actions toward tribal courts confirm the operative assumption that tribal courts have civil jurisdiction over non-Indians. Since 1935, the regulations governing tribal "C.F.R. courts," *see Oliphant*, *supra*, at 196 n. 7, have provided for tribal civil jurisdiction over non-Indians where the parties consent to it. *See* F. Cohen, *Handbook of Federal Indian Law* 254 n. 102 (1982 ed.) No non-Indian, quite obviously, can confer jurisdiction on a tribal court where such jurisdiction does not exist. Thus, although the tribes operating C.F.R. courts condition their assumption of jurisdiction over non-Indians by requiring non-Indian consent, that consent does not create subject matter jurisdiction that the tribe otherwise would lack. The Department of Interior also has approved tribal laws that assert jurisdiction over non-Indians. *See, e.g., Cowan* v. *Rosebud Sioux Tribe*, 404 F. Supp. 1338 (D.S.D. 1975).[8] The Executive

Tribal citizenship, of course, is not and never has been necessary for a person to be subject to tribal civil jurisdiction. Some nexus, however, between the non-Indian or his conduct and tribal interests to be protected by tribal jurisdiction is necessary. *Cf., Montana* v. *United States*, 450 U.S. 544, 565-566 (1981). The nexus required and its presence in this case is discussed *infra* at Section I.C.

[8] The fact that the present form of tribal adjudicatory bodies is of relatively recent origin hardly suggests that the tribes lacked civil jurisdiction, or have not exercised such jurisditcion as a historical matter. Non-Indians entering tribal domains and dealing with Indians no doubt conformed their conduct to tribal mores and submitted to whatever dispute resolution mechanisms existed. That such exertions of tribal authority would not be recognizable as "civil adjudicatory jurisdiction" to the modern eye cannot change their fundamental character as such.

The demands of modern governance have forced most tribes to abandon their traditional methods of dispute resolution in favor of the formalized structures and processes of Anglo-American

Branch long has assumed and stated explicitly that, absent limitations imposed by treaty or an act of Congress, Indian tribes retain civil jurisdiction, both regulatory and adjudicatory, over matters involving Indians and non-Indians arising in Indian Country.

Congress, moreover, has evinced a similar understanding. As noted by the editors of the 1982 edition of the *Handbook of Federal Indian Law*, Congress has acted disparately and, presumably, on a different set of assumptions, in the separate areas of criminal and civil jurisdiction.

> Congress has provided for federal jurisdiction over interracial crimes in Indian country since the late eighteenth century and federal statutes today establish a comprehensive set of criminal provisions applicable to Indian country. In the civil field, however, Congress has never enacted general legislation to supply a federal or state forum for disputes between Indians and non-Indians in Indian country. Furthermore, although treaties between the federal government and Indian tribes sometimes required the tribes to surrender non-Indian criminal offenders to state or federal authorities, Indian treaties did not contain provision for tribal relinquishment of civil jurisdiction over non-Indians. Congress' failure to regulate civil jurisdiction in Indian country suggests . . . that there was no jurisdictional vacuum to fill . . . .

judicial bodies. During the genesis of modern tribal courts, tribal governments, at the urging of federal officials, constrained the jurisdiction of their courts over non-Indians to some degree. *See* F. Cohen, *Handbook of Federal Indian Law* 382 (1942). As time passed and tribal courts acquired greater experience and sophistication, they asserted theretofore unexercised powers of civil jurisdiction, again often with the approval of federal authorities. *See generally Indian Self-Determination and the Role of Tribal Courts* 11-60 (American Indian Lawyer Training Program 1977). That these governments deferred assertion of jurisdiction over non-Indians until adequate procedures and capabilities were developed should not be read as an absence of such jurisdiction.

F. Cohen, *Handbook of Federal Indian Law* 253-254 (1982 ed.); and *cf.*, *Oliphant*, *supra*, at 201-202 (Congressional legislation governing criminal jurisdiction over non-Indians in Indian Country suggests absence of tribal jurisdiction).

The decisions of the Court confirm this analysis. In *Williams* v. *Lee*, 358 U.S. 217 (1959), the Court held that the Navajo Tribal Court had exclusive jurisdiction to adjudicate a contract dispute involving an Indian and a non-Indian arising on the Navajo Reservation. The Navajo treaty with the United States, Treaty of June 1, 1868, 15 Stat. 667, contained provision for federal jurisdiction over interracial crimes on the reservation. No provision was made, however, for the adjudication of non-criminal wrongs by or against Indians on the reservation. The Court held that, in light of the treaty, the Navajo courts not only had jurisdiction over the matter, but exclusive jurisdiction.

The same result was reached in *Kennerly* v. *District Court*, 400 U.S. 423 (1971). In that case, the Blackfeet Tribe was held to have exclusive jurisdiction over the same sort of dispute as was present in *Williams*. The Blackfeet Tribe was party to the Sioux Treaty of 1868. Treaty of April 29, 1868, 15 Stat. 635. Like the Navajo treaty referenced above, the Blackfeet treaty made provision for interracial crimes, but not interracial civil disputes.[9]

Clearly, then, the shared assumption of the three branches of the federal government was and is that Indian tribes have, and always have had, civil authority, both regulatory and adjudicatory, over non-Indians. "In these respects the present case[] differ[s] sharply from *Oliphant* . . . , in which [the Court] stressed the shared

[9] The Crow Treaty of May 7, 1868, 15 Stat. 667, contains provisions identical in substance to those contained in the Navajo and Blackfeet treaties.

assumptions of the Executive, Judicial and Legislative Departments that Indian tribes could not exercise criminal jurisdiction over non-Indians." *Cf. Washington, supra*, 447 U.S. at 153.

Neither may it be said that subjecting non-Indians to the rules of substantive and procedural law enforced by tribal courts is somehow unfair. *See Oliphant, supra*, at 210-211. Unlike substantive criminal law, courts are free to apply the substantive civil law of other jurisdictions where appropriate. *See* I Restatement of the Law (Second), *Conflict of Laws 2d* § 6 (1971). *See also* Note, *Conflict of Laws and the Indian Reservation*, 8 Am. Indian L. Rev. 361 (1981). Tribal adjudication of disputes involving non-Indians, therefore, does not "seek to impose upon them the restraints of an external and unknown code," a concern expressed by this Court in *Oliphant*. *Cf.* 435 U.S. at 210-211, *quoting Ex Parte Crow Dog*, 109 U.S. 556, 571 (1883).

Indeed, the contrary is true. Tribal courts are competent tribunals applying familiar rules of substantive law and operating under rules of procedure with which non-Indians are well-acquainted.[10] The Crow Tribal Court in this case did not seek to apply some bizarre or arcane rule of liability known only to the Crows. Indeed, it found, upon hearing the plaintiff's evidence after the defendant's default, that the school district failed to meet standards established for it by the State of Montana. *See Sage* v. *Lodge Grass School District*, 10 Indian L. Rep. 6019 (Crow Tr. Ct. 1982).

Neither the legal authorities nor the policy considerations upon which the Court relied in *Oliphant* support a holding that tribal courts generally lack civil adjudicatory authority over non-Indians. The remaining question, therefore, is whether a tribal interest of sufficient magnitude is presented in civil adjudications against non-

[10] *See* Section III, *infra*.

Indians which would justify the assertion of tribal power. The answer to this question is found in this Court's decision in *Montana* v. *United States*, 450 U.S. 544 (1981).

C. The District Court plainly erred in holding that *Montana* v. *United States* forecloses the exercise of tribal jurisdiction in this case.

The general rule is that, if the tribe has some governmental interest in non-Indian conduct on fee land within the reservation, there is no impediment to tribal jurisdiction.[11] Thus, in *Buster* v. *Wright*, 135 F. 947, 951 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906), the court observed that "the jurisdiction to govern the inhabitants of a country is not conditioned or limited by the title to the land which they occupy in it . . . ." *And see Morris* v. *Hitchcock*, 194 U.S. 384, 392 (1904).

The Executive branch shares this understanding of tribal power:

> [E]ven if the Indian title to the particular lots sold had been extinguished . . . the result is still the same, for the legal right to purchase land within an Indian nation gives to the purchaser no right of exemption from the laws of such nation.

23 Op. Att'y Gen. 214, 217 (1900). In the comprehensive opinion on the powers of tribal governments, the Interior Department Solicitor reached a similar conclusion. 55 Interior Dec. 14, 50 (1934).[12]

[11] *A fortiori*, when non-Indians enter reservation lands owned by Indians, they are subject to tribal civil authority. *Montana, supra* at 557. On those reservations where all of the land is owned by Indians, therefore, the tribes always will have civil jurisdiction over non-Indians.

[12] Each of these authorities is cited with approval in *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152-153 (1980), in support of the Court's holding that tribes may impose cigarette taxes on non-Indian purchasers.

Thus, as the Court noted in *Montana*, the tribal interest justifying regulation must be shown to derive from consensual dealings by the non-Indians with tribal members, or conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe." 450 U.S. at 566. The district court's analysis of this last principle misses the mark. The court stated that although a personal injury obviously affects the health and welfare of the injured person, it does not affect the health and welfare of the Tribe, because "an individual is not a tribe." 560 F. Supp. at 216-217.[13]

This Court has rejected the notion that tribal interests are not at issue in cases involving the affairs of individual Indians. In *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 163, 181 (1973), the State argued that the imposition of its income taxes on reservation Indians affected only the interests of individual Indians and not those of the tribe. The Court noted that

> when Congress legislates on Indian matters, it has, most often, dealt with the tribes as collective entities. But those entities are, after all, composed of individual Indians, and the legislation confers individual rights.

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[13] Of course, a tribe *qua* tribe has no "health or welfare" except in a metaphoric sense. People have or lack health or welfare, and the health and welfare of a government is no more than the collective health and welfare of its people. Moreover, the Court in *Montana*, in making its assertion regarding the health and welfare of the tribe, cited, *inter alia*, *Williams* v. *Lee*, 358 U.S. 217, 220 (1959), a case which, of course, involved a single transaction and a single Indian.

In *Montana*, of course, no Indians were shown to be affected by the non-Indian conduct that the Tribe sought to regulate. In contrast, this case presents a situation in which an Indian has suffered direct, tangible harm from non-Indian conduct. This fact alone distinguishes this case from *Montana* and requires a different result regarding the existence of tribal jurisdiction.

This approach applies as well to individual civil actions. *See Babbitt Ford Inc.* v. *Navajo Indian Tribe*, 710 F.2d 587, 594 (9th Cir. 1983).

Tribal governmental interests are the sum of the interests of its people. The opinions in *Williams* v. *Lee*, 358 U.S. 217 (1959), and *Fisher* v. *District Court*, 424 U.S. 382 (1976), demonstrate this point clearly. The governmental interests that a tribe has in a single injury to a single tribal member cannot be divorced from the whole of like occurrences. Viewed as a single incident, such an occurrence never will give rise to a governmental interest sufficient to justify tribal jurisdiction.[14] Viewed as a part of a class of such occurrences, however, personal injury to a tribal member clearly affects the health and welfare of the tribe, and the tribe may bring its power to bear to redress the injury and govern the conduct causing it.[15]

In sum, a tribal member has been injured in the course of his on-reservation activities. He alleges that his injury results from the negligence of a non-Indian entity resident on the reservation. He has petitioned the court established by his tribe for redress of his injury. The tribal

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[14] A single instance of negligence would not seem to be an important governmental interest for a state government either. Yet the universal existence of tort law demonstrates that reallocation of losses from those upon whom they fall to those whose negligence cause the losses *is* an important governmental function.

[15] This Court is well-acquainted with the concept of the aggregation of single acts giving rise to governmental control of the whole class of such acts. In *Wickard* v. *Filburn*, 317 U.S. 111 (1942), a single small farmer sought exemption from federal wheat acreage allocation laws on the grounds that his conduct, standing alone, had no conceivable effect on the national economy. The Court rejected that contention, noting properly that even though the activities of a single small farmer had no perceptible impact on interstate commerce, the aggregate of the activities of all such farmers did affect commerce and gave rise to a national power to regulate those activities. A similar approach is appropriate here.

interest is clear. Non-Indian conduct allegedly has affected directly the health and welfare of a tribal member, and similar conduct, if repeated, threatens the health and welfare of other tribal members. One cannot say, therefore, that the health and welfare of the tribe is unaffected, or that the tribe lacks a governmental interest in the subject matter. Therefore, a tribe always will have jurisdiction over a personal injury action brought by an Indian against a non-Indian that arises on the reservation.

D. Tribal jurisdiction over the School District is not barred by sovereign immunity.

The School District's status as a political subdivision of the State does not immunize it from tribal jurisdiction. Just as a tribe is subject to state jurisdiction for its off-reservation activities, *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973), so too should a state be subjected to tribal processes for its on-reservation activities. *Cf. Nevada* v. *Hall*, 440 U.S. 410 (1979).[16] Moreover, "even if the State's interests were implicated . . . , it must be remembered that tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." *Washington, supra*, at 154.

Also significant is the fact that Montana has waived its immunity from suit. Article 2, § 18 of the Montana

[16] In this regard, the School District's presence on the reservation would seem to be more voluntary than is indicated in the petitioner's brief. The federal government, in the Crow Allotment Act of 1920, 41 Stat. 751, offered the State the option of acquiring the "Section 16s" (the traditional "school sections") on the Reservation, in return for the State's assurance that Crow children would be allowed "to attend the public schools of said state on the same conditions as the children of white citizens of said state." *Id.* The suggestion that this provision required the State to open schools on any Section 16 thus acquired is a dubious proposition. In any event, the State clearly was not compelled to exercise its option, and the State, therefore, entered the Reservation on a voluntary basis.

Constitution provides that: "The state, counties, cities, towns, and all other local governmental entities shall have no immunity from suit for injury to a person or property." Although the petitioners urge that Mont. Code Ann. § 2-9-311 (1983) limits this waiver to the State's own courts, neither the Constitution nor, indeed, the statute itself express such a limitation.[17] At least until such time as State tribunals have addressed the issue definitively, the constitutional waiver should be given its plain meaning.

II. Assuming that federal courts have jurisdiction over such matters,[18] out of respect for tribal processes and prerogatives, and in order that wasteful and unnecessary litigation be avoided, federal courts should abstain from hearing cases brought by non-Indian challengers until tribal remedies have been exhausted.

A. Traditional concerns regarding comity and solicitude for tribal self-government require that tribal courts have the first opportunity to resolve questions as to their jurisdiction.

As was noted by Judge Wright in his opinion below, 736 F.2d 1324-1326, the "proper forum for [determining the scope of tribal court jurisdiction], at least in the first instance, is not a federal court but a tribal court." *Quoting* majority opinion at 1323-1324 (brackets in original). Several policy objectives support a rule requiring federal courts to abstain from cases challenging tribal court jurisdiction until the challengers first exhaust tribal remedies.

[17] The decision in Montana v. Peretti, 661 F.2d 756 (9th Cir. 1981), is inapposite. The court there held merely that the constitutional waiver was not sufficiently express to infer a waiver of the State's Eleventh Amendment immunity under the strict standards of Edelman v. Jordan, 415 U.S. 651, 673 (1974).

[18] *Amici* here do not mean to concede the existence of federal jurisdiction over this matter.

In *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 70 (1978), this Court took note of the "intrusive effect of federal judicial review upon tribal self-government" in finding that the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303 (1982), does not authorize federal court actions against tribal governments for alleged violations of the Act, save when the relief requested is a writ of *habeas corpus*. Similar concerns are present with greater force when the challenge to tribal action involves not merely the manner in which tribal power is exercised, but the very existence of tribal power.[19]

Before this Court's decision in *Martinez*, the lower federal courts had imposed upon the challengers of tribal action a requirement that they exhaust their remedies in tribal forums before bringing their claims to federal court. *See, e.g., Janis* v. *Wilson*, 521 F.2d 724 (8th Cir. 1975); *Howlett* v. *Salish & Kootenai Tribes*, 529 F.2d 233 (9th Cir. 1976). The reasons for this requirement were eminently sound and equally applicable in cases challenging tribal jurisdiction. First, the exhaustion requirement was intended to strengthen tribal government and cultural identity, policy goals which are undermined when federal courts unnecessarily intrude before tribal processes have run their course. *Rosebud Sioux Tribe* v. *Driving Hawk*, 534 F.2d 98, 100 (8th Cir. 1976).

Second, the exhaustion requirement prevents premature action by federal courts. In some instances, tribal

[19] But for the result in *Martinez*, the instant case well might be presented in an entirely different context. Before *Martinez*, had the petitioners here appeared in tribal court to challenge the default judgment and been denied relief, they could have brought an Indian Civil Rights Act action. Instead, because *Martinez* denies federal jurisdiction over such actions, the petitioners assault the *existence* of tribal power rather than its *exercise*. Ironically, a decision supporting tribal government thus becomes a threat to it. Unable to avail itself of the surgeon's scalpel previously available under ICRA, the district court instead reached for the axe provided by *Oliphant* and proceeded to lop off the head of the tribal court.

courts may interpret tribal law in such a manner as to render moot the claim a challenger wishes to bring. *See McCurdy* v. *Steele*, 506 F.2d 653, 656 (10th Cir. 1974).[20] Federal courts not only should defer to tribal interpretations of tribal law, *Tom* v. *Sutton*, 533 F.2d 1101, 1105 (9th Cir. 1975); *Runs After* v. *Cheyenne River Sioux Tribe*, 437 F. Supp. 1035, 1037 (D. S.D. 1977); *Conroy* v. *Frizzell*, 429 F. Supp. 918, 923-24 (D. S.D. 1977), but also should allow the tribe to decide key questions before they are brought to federal court.

Finally, the exhaustion requirement was grounded in notions of comity. "The same principles of comity that apply in federal court-state court relations are forcefully applicable in federal court-tribal court relations." *Brunette* v. *Dann*, 417 F. Supp. 1382, 1386 (D. Idaho 1976). A proper solicitude for tribal processes, therefore, was evidenced by the courts.

These self-same considerations support the imposition of an exhaustion requirement in cases such as this one. Modern federal policy seeks to strengthen tribal self-government. *Martinez, supra*, at 59-65; *cf. Morton* v. *Mancari*, 417 U.S. 535, 551 (1974). A key aspect of this policy is the strengthening of tribal legal institutions. *See Martinez, supra*, at 63-64.[21] A fundamental power of any judicial forum is the ability to determine the extent of its jurisdiction under applicable law. *Cf.* Wright, *Law of Federal Courts* § 16 (1976); *and see United States* v. *United Mine Workers*, 330 U.S. 258 (1947). Tribal courts are thoroughly familiar with the limita-

[20] Some tribal courts, for example, disclaim jurisdiction over actions involving non-Indians absent consent from the parties. *See* F. Cohen, *Handbook of Federal Indian Law* 254 n.102 (1982 ed.).

[21] For example, *amici* Standing Rock Sioux Tribe, Assiniboine and Sioux Tribes and Cheyenne River Sioux Tribe have received grants for revision of tribal codes under the Indian Self-Determination and Education Assistance Act. Pub. L. 93-638, 88 Stat. 2203 (1975).

tions on their jurisdiction imposed by federal law, perhaps more familiar than any other court. See discussion *infra* at Section III.

This Court, of course, has the power to create such a requirement. The various abstention doctrines developed by the Court demonstrate this power. Abstention of the type discussed in *Middlesex County Ethics Committee* v. *Garden State Bar Association*, 457 U.S. 423 (1982) is most apt.

In *Middlesex*, the Court discussed the policies underlying abstention. Among those policies was the notion of comity—the belief that the federal system fares best if the states are left free to perform their functions in their own way. The notion of comity, moreover, precludes any presumption that the state will not safeguard rights existing under federal law.

The idea of comity also is appropriate in federal-tribal relations. As noted above, federal policy favors strengthening tribal government, and fulfillment of the federal responsibility to Indians is accomplished through the medium of tribal government. Surely this federal responsibility is met best when the tribes "are left free to perform their separate functions in their separate ways." *Cf. Middlesex*, *supra*, at 432.

In *Middlesex*, the Court identified three inquiries relevant to determining the propriety of abstention. The first is whether there is an ongoing state proceeding in which the challenge to state power may be litigated. In this case, substituting "tribe" for "state", that requirement clearly is met. The Crow Tribal Court proceeding was under way before the federal action, and should have been allowed to run its course.

The second inquiry is whether the state proceedings implicate important state interests. In analogizing to the present situation, the question would be whether the issue to be litigated in federal court implicates important tribal interests. Issues involving the extent of tribal jurisdiction quite clearly implicate important tribal interests. Indeed, because the federal court action here attacks the very existence of tribal jurisdiction, the intrusion on tribal policy is far more profound that the intrusion on state interests resulting from concurrent federal and state proceedings.[22] Tribal courts should have the opportunity to resolve such cases in the first instance.

The third inquiry is whether there is an adequate opportunity in the state proceedings to raise constitutional challenges. To analogize again to this situation, clearly there exists under Crow Tribal Court procedures a means by which the jurisdictional issue may be litigated. Indeed, tribes *must* offer such a procedure under the Indian Civil Rights Act, 25 U.S.C. § 1302 (1982). Under ICRA, a tribe may not deny due process of law. To act without jurisdiction is a fundamental failure of due process for which a tribe must offer redress. *See Martinez*, *supra*, at 65.

In view of the federal policy of strengthening tribal government and tribal courts, and in order to avoid needless litigation, federal courts should take jurisdiction over challenges to tribal civil adjudicatory jurisdiction, if at all, only when the challengers have exhausted tribal remedies. These cases, after all, affect the tribes more profoundly than they affect private parties, and the tribal courts deserve the opportunity to have their views made known before the intrusive power of the federal government is brought to bear.

B. The conduct of the petitioners in this matter exemplifies the unhappy consequences following from the absence of a requirement that challengers of tribal jurisdiction first exhaust their tribal remedies.

Assuming, *arguendo*, that the Crow Tribe has "thrown down the gauntlet," Pet. Br. at 22, then it is the peti-

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[22] An attack of this sort on state jurisdiction would be forbidden by the Anti-Injunction Act. 28 U.S.C. § 2283 (1982).

tioners' failure to show even a minimal degree of respect for tribal processes which has forced this unfortunate confrontation. Had the petitioners properly answered the summons and complaint served upon them, no default judgment would have been entered. Had they moved to set aside the default judgment in accordance with Rule 17(d) of the Crow Rules of Civil Procedure before repairing to federal court, the case might never have come this far. Had they appeared specially to challenge jurisdiction in accordance with Crow Rule 7, the case might have ended at that point. Had they defended on the merits of the negligence claim, a judgment in their favor might have resulted. Had they presented their arguments regarding the immunity from seizure of School District property to the Tribal Court, that court may well have formulated a different method of judgment execution, had a trial on the merits resulted in a judgment against the District at all.

But the School District and its insurer, in a regrettable display of disdain for legitimate tribal processes, attempted to circumvent those processes and seek sanctuary in the federal courts. What once was a garden-variety civil action now has mushroomed into a case of constitutional dimension threatening tribal powers the existence of which has been acknowledged by federal authorities for more than a century. Three federal courts will have passed on the case before litigation on the merits has occurred. This case demonstrates, as could no other, the pernicious consequences and needless confrontation which results when non-Indian challengers to tribal authority are allowed to circumvent legitimate tribal processes established for the resolution of such questions. Imagine the protests which would have come from Montana officials had the Indian parties in *Kennerly* v. *District Court*, 400 U.S. 423 (1971) or *Fisher* v. *District Court*, 424 U.S. 382 (1976), taken their challenges to state jurisdiction directly to federal district court without first abiding by state processes. In each case, the

Montana courts were found by this Court not to have jurisdiction, yet the Indian parties litigated the jurisdictional issues in Montana courts. Tribal courts are entitled to similar respect.

III. Tribal courts are modern judicial tribunals applying familiar rules of law and procedure and wholly capable of applying the complex federal law regarding tribal jurisdiction.

"Indian tribal court systems have become increasingly sophisticated and resemble in many respects their state counterparts." *Cf. Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 211-212 (1978). Indeed, at the urging and with the assistance of the federal government,[23] tribal courts, laws and procedures, have developed to the point that they often are indistinguishable from lower state tribunals. Tribal Courts have established rules of procedure not unlike those of state courts, and have displayed a particular facility for analyzing federal law regarding tribal jurisdiction.

Thus, in *Crow Creek Sioux Tribe* v. *Buum*, 10 Indian L. Rep. 6031 (Intertribal Ct. App. 1983), the court conducted a sophisticated analysis of the jurisdiction of tribal courts in the areas of civil and criminal contempt. Holding that tribes may hold non-Indians in civil, but not criminal, contempt of court, the court reversed the lower court's entry of a contempt order on the grounds that the tribal law authorizing contempt sanctions violated the Indian Civil Rights Act.

In *North Dakota ex rel. Wefald* v. *Kelly*, 10 Indian L. Rep. 6059 (Standing Rock Sx. Tr. Ct. 1983), the court reviewed federal law and found tribal jurisdiction over an action brought by the State to collect on a debt owed by a tribal member. In *Fisher* v. *District Court*, 424 U.S. 382 (1976), this Court reversed the Montana Supreme Court and agreed with an opinion of the Appellate

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[23] *See* note 21, *supra*.

Court of the Northern Cheyenne Tribe that the Tribal court had exclusive jurisdiction of a child custody matter involving only Indians.

One tribal decision of note already has been brought to the Court's attention. In *Blackfeet Tribal Business Council* v. *East Glacier Water & Sewer District*, 11 Indian L. Rep. 6021 (Blackfeet Tr. Ct. 1984), the court found tribal jurisdiction over a non-Indian public corporation. Despite the suggestions of *amici* Glacier County and East Glacier Water & Sewer District, Br. Amicus Curiae in Support of Petition (filed Oct. 26, 1984), the Blackfeet Tribal Court is not a lawless marauder running roughshod over defenseless non-Indians in violation of its own charter. Indeed, the Tribal Court's opinion is learned and reasoned, applying the relevant precedents and grounding its decision on sound analysis and public policy.

The court first noted that jurisdiction exists, if at all, under the grant of power to the court contained in the Tribal Constitution. It then noted the existence of relevant federal precedent but added, correctly it would seem, that tribal forums are the ultimate arbiters of the meaning of tribal law. The court then cited a federal district court decision, *United States ex rel. Rollingson* v. *Blackfeet Tribe*, 244 F. Supp. 474 (D. Mont. 1965), in which the federal court ruled that a dispute between a non-Indian and a tribal judge was within the exclusive jurisdiction of the Blackfeet Tribal Court. The court went on to note relevant precedents from this Court, including *Kennerly* v. *District Court*, 400 U.S. 423 (1971), which held that the Blackfeet Tribal Court had exclusive jurisdiction over a debt action arising on the Reservation and involving both Indian and non-Indian parties.[24] The court

[24] The Sewer District's position thus takes on a special irony. If it wants to collect by judicial action the debts owed it by Blackfeet Tribal members, the decision in *Kennerly* requires it to repair to the very court of whose jurisdiction it now makes complaint.

then noted the historic practice of non-Indians using the Tribal Court, and identified sound policy reasons favoring the existence of tribal jurisdiction.

Whether or not the Blackfeet court ultimately is found to be correct, and *amici* assert that it was correct, these are not the lunatic ravings of a judge unable to live within the legal limits of his power. Rather, it is an example of sound scholarship and reason from an Indian jurist faced with difficult issues of tribal and federal law.

The tribal court procedures found in modern tribal codes are fully adequate to assure fair, reasonable and accurate adjudication.[25] Indeed, tribal procedures often are drawn from the procedures of state and federal courts. These codes contain rules governing pre-trial procedures, trials and judgments. *E.g.*, Title II, Standing Rock Sioux Tribe Code of Justice; Crow Rules of Civil Procedure. Although usually more simple than the complex rules governing procedure in state and federal courts, tribal rules have as their guiding standards the same principles as those applicable to federal and state rules. Thus, the Devils Lake Sioux Tribe Law and Order Code provides, at Chapter I, Title B, § 104(2)(a) that "[t]his Code shall be liberally construed to effect its purpose and to promote justice." *Compare* Fed. R. Civ. P. 1.

Except where a specific tribal policy requires otherwise, the substantive rules of tribal law are likely to be much the same as those of the states. Indeed, many tribal courts apply the substantive law of the state in which they are located in the absence of countervailing tribal or federal law. *E.g.*, 25 C.F.R. § 11.23(c) (1984) ("[Matters not covered by tribal or federal law are decided] according to the laws of the State in which the matter in dis-

[25] The portions of the Tribal Codes of *amici*, Assiniboine and Sioux Tribes, Devils Lake Sioux Tribe and Standing Rock Sioux Tribe, which deal with courts and civil procedure have been lodged with the Clerk of the Court and served on counsel for the parties.

pute may lie."); Comprehensive Code of Justice of the Assiniboine and Sioux Tribes § 501(d) ("Where appropriate, the Court may . . . be guided by the statutes, common law or rules of decision of the States . . . ."). *See also* F. Cohen, *Handbook of Federal Indian Law* 334-335 (1982 ed.).

Finally, note should be taken of the increasing capabilities of the Indian judiciary. A variety of training programs for tribal judges are regularly conducted on every imaginable topic. The tremendous upsurge in the number of Indians who have law degrees and their desire to serve in tribal judiciaries guarantee continued improvement in tribal court functions.

Modernized tribal codes, increased training for tribal judges and the influx of Indian people having law degrees promise that tribal courts will continue their rapid progress. The quality of justice they now dispense certainly meets the constitutional and statutory norms, and will continue to improve. This Court should allow this evolution to continue and take its natural course.

CONCLUSION

For the foregoing reasons, the mandate of the Court of Appeals should be affirmed.

Respectfully submitted,

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